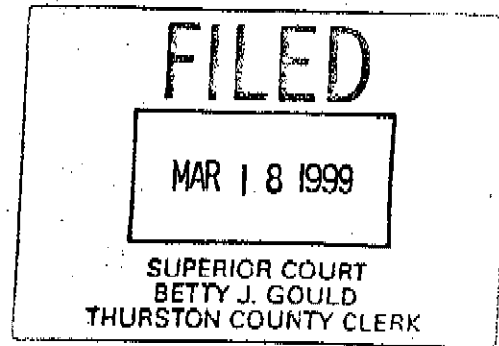


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DEPARTMENT OF ECOLOGY  
OFFICE OF DIRECTOR

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR THE COUNTY OF THURSTON

AMERICAN RIVERS, CENTER FOR	)	Civ. No.	99 2 00480 6
ENVIRONMENTAL LAW AND POLICY,	)		
WASHINGTON ENVIRONMENTAL	)	PETITION FOR JUDICIAL REVIEW AND	
COUNCIL, PACIFIC COAST FEDERATION	)	DECLARATORY AND INJUNCTIVE	
OF FISHERMEN'S ASSOCIATIONS, AND	)	RELIEF	
INSTITUTE FOR FISHERIES RESOURCES,	)		
	)		
Petitioners,	)		
	)		
v.	)		
WASHINGTON STATE DEPARTMENT OF	)		
ECOLOGY	)		
	)		
Respondent.	)		

INTRODUCTION

1. By this action, petitioners American Rivers, Center for Environmental Law and Policy, Washington Environmental Council, Pacific Coast Federation of Fishermen's Associations, and Institute for Fisheries Resources seek to compel the Washington State Department of Ecology ("Ecology") to perform its statutory duties under RCW 90.03.360, a

PETITION FOR JUDICIAL REVIEW AND  
DECLARATORY AND INJUNCTIVE RELIEF- 1

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1 provision of the Water Code that requires metering of diversions from public water sources. The  
2 statute provides that Ecology shall require metering or measurement by other approved methods  
3 of: (1) all new water diversions; and (2) all existing diversions from waters containing depressed  
4 or critical fish stocks or which divert more than one cubic foot per second ("cfs") of water.  
5 RCW 90.03.360.

6         2.       Petitioners state four causes of action under the judicial review provisions of the  
7 Washington Administrative Procedure Act ("APA"), RCW 34.05.570. First, Ecology has  
8 violated RCW 34.05.570(2) because its implementing rule, WAC 508-64-050, is contrary to  
9 RCW 90.03.360 and exceeds the statutory authority conferred upon the agency. Ecology's rule  
10 fails to require or permit metering under the conditions specified in RCW 90.03.360. For relief,  
11 petitioners seek a judgment declaring WAC 508-64-050 invalid and compelling the  
12 promulgation of a new rule consistent with and in support of the duties mandated by the statute.  
13 Second, by failing to require metering of new and existing rights as provided in RCW 90.03.360,  
14 Ecology has failed to perform a duty required by law, exceeded its statutory authority, and acted  
15 arbitrarily and capriciously in violation of RCW 34.05.570(4). Petitioners seek an order  
16 directing Ecology to require metering of all new and existing rights as specified in RCW  
17 90.03.360. Third, by failing to prioritize implementation of the metering requirements for  
18 existing rights over its other compliance work and, indeed, failing to implement the metering  
19 requirement at all, as required by RCW 90.03.360(2), Ecology has failed to perform a duty  
20 required by law, exceeded its statutory authority, and acted arbitrarily and capriciously in  
21 violation of RCW 34.05.570(4). Petitioners seek an order directing Ecology to prioritize  
22 implementation of the metering requirements for existing rights as provided in RCW  
23 90.03.360(2). Fourth, Ecology has failed to apply the provisions of RCW 90.03.360 to

1 groundwater withdrawals. Petitioners seek a declaration that RCW 90.03.360 applies to  
2 groundwater withdrawals and an order directing Ecology to require metering of new and existing  
3 groundwater withdrawals as specified in RCW 90.03.360.

4 3. Ecology's failure to implement and enforce the metering statute undermines  
5 effective management of Washington's scarce water resources and threatens harm to declining  
6 salmonid populations throughout the state. Petitioners ask this Court to compel Ecology to  
7 fulfill its statutory duties under RCW 90.03.360.

#### 8 PARTIES

9 4. Petitioner American Rivers is a national, non-profit conservation organization  
10 dedicated to protecting and restoring the nation's outstanding rivers and river resources.  
11 American Rivers' regional headquarters for the Pacific Northwest is located in Seattle,  
12 Washington. Many of American Rivers' more than 22,000 members reside in the state of  
13 Washington and use and enjoy Washington's rivers and streams for recreational, aesthetic,  
14 economic, and educational purposes. On behalf of its members, American Rivers has been  
15 active in encouraging state and federal agencies to protect instream flows and water quality  
16 required to provide functioning aquatic habitat for Washington's declining salmonid populations.  
17 American Rivers' mailing address is: American Rivers, Northwest Regional Office, 150  
18 Nickerson Street, Suite 311, Seattle, Washington 98109.

19 5. Petitioner Center for Environmental Law and Policy is a non-profit corporation  
20 registered in the state of Washington. The Center's members live, work, recreate, and use waters  
21 in and along Washington's streams and rivers, including stream segments containing depressed  
22 and critical fish stocks as determined by the Washington Department of Fish and Wildlife. The  
23 Center has long advocated protection of water resources and enforcement of the Water Code in

1 administrative, legislative, and judicial proceedings. The Center's mailing address is: 1165  
2 Eastlake Ave. East, Suite 400, Seattle, Washington 98109.

3 6. Petitioner Washington Environmental Council ("WEC") is a non-profit  
4 corporation registered in the state of Washington. WEC is a statewide, non-profit, nonpartisan  
5 organization devoted to environmental protection in the state of Washington. WEC has  
6 approximately 3000 individual members and nearly 100 affiliated organizations with a combined  
7 membership of approximately 100,000 individuals. WEC members and members of WEC  
8 affiliate organizations engage in hiking, fishing, nature study, and other recreational activities, as  
9 well as agriculture, aquaculture, and the domestic use of water, all of which are dependent on the  
10 sound management of the water resources of the state. Since its founding in 1967, WEC has  
11 been actively participating in water resources policy and management, serving on numerous state  
12 task forces, advocating for its members' and the public's interests before administrative agencies,  
13 commissions and the legislature, and engaging in litigation.

14 7. Petitioner Pacific Coast Federation of Fishermen's Associations ("PCFFA") is a  
15 trade association and federation which is itself made up of 25 major port associations and vessel  
16 owners associations with a coastwide presence from San Diego to Alaska. PCFFA is the west  
17 coast's largest organizations of commercial fishermen, and many of its association's members  
18 are, or have been, salmon fishermen who make all or part of their livelihoods from the harvest  
19 and sale of Pacific salmon. Its primary members association in Washington State, the  
20 Washington Troller's Association (WTA), represents the interests of the owner/operators of  
21 several hundred commercial salmon fishing boats doing business primarily in Washington State.  
22 Many PCFFA and WTA members have been, and are now, directly financially impacted by the  
23

1 depletion of instream water flows needed for salmon spawning and rearing in Washington State -  
2 impacts which the failure to enforce water metering requirements have severely exacerbated.

3 8. Petitioner Institute for Fisheries Resources ("IFR") is a nonprofit marine resource  
4 and salmon protection organization which is affiliated with PCFFA. Its primary mission, on  
5 behalf of its 850 members (most of whom are commercial fishermen also affiliated with PCFFA)  
6 is to protect, preserve and restore the anadromous salmon resources of the west coast. These  
7 resources are dependent for their health on adequate instream water flows during critical  
8 spawning and rearing seasons. In Washington State, the adequacy of these instream flows and  
9 the ability of IFR to accomplish its conservation mission, are directly related to the metering  
10 provisions at issue in this petition.

11 9. Petitioners are represented by Todd True and Amy Sinden, Earthjustice Legal  
12 Defense Fund, Inc., 705 Second Ave., Suite 203, Seattle, Washington 98104. Petitioner  
13 American Rivers is also represented by Katherine P. Ransel, American Rivers Northwest  
14 Regional Office, 150 Nickerson Street, Suite 311, Seattle, Washington 98109.

15 10. The rights and privileges of the petitioners and petitioners' members are impaired  
16 or violated by Ecology's failure to implement the metering statute, RCW 90.03.360. Information  
17 from metering or other measurement devices is essential for determining whether existing  
18 appropriators are complying with limitations on the quantity and season of use contained in their  
19 water rights. Ecology's failure to require metering undermines effective enforcement of these  
20 conditions. In addition, without data on actual use, Ecology is unable to make informed  
21 determinations regarding water availability, harm to existing rights, and the public interest as  
22 required for decisions on new water right applications and the transfer of existing rights.  
23 Ecology's failure to implement and enforce RCW 90.03.360 contributes to insufficient instream

1 flows and overappropriation of Washington's streams and rivers. Depletion of instream flows  
2 harms the recreational, economic, aesthetic, and educational interests of petitioners and their  
3 members in the use and enjoyment of Washington's water resources.

4 11. Respondent Washington Department of Ecology is an agency of the state of  
5 Washington charged with managing and regulating state water resources. RCW 43.21A.020.  
6 Ecology's authorizing statute directs Ecology to supervise "the appropriation, diversion, and  
7 use" of public waters within the state and to "regulate and control the diversion of water in  
8 accordance with the rights thereto." RCW 43.21A.064. Ecology has the duty to implement and  
9 enforce the metering statute. RCW 90.03.360. Ecology's mailing address is 300 Desmond  
10 Drive, Lacey, Washington 98503.

#### 11 JURISDICTION AND VENUE

12 12. This Court has jurisdiction under RCW 34.04.570, which authorizes judicial  
13 review of agency action, including the failure of an agency to perform a legally required duty.  
14 Because this action involves a rule challenge, venue in Thurston County is appropriate under  
15 RCW 34.05.514.

#### 16 BACKGROUND

17 13. Washington's fish and water resources are in a state of crisis. Expanding  
18 development and population growth have created great demand for water for agricultural,  
19 industrial, and domestic purposes. Increased appropriations from streams and connected  
20 groundwater have depleted instream flows needed to support fish habitat. Many of  
21 Washington's streams and rivers have insufficient remaining flow to support adequate habitat for  
22 fish. In 1996, Ecology identified 50 stream segments in Washington that have insufficient  
23 instream flows to satisfy state water quality standards for, among other things, the provision of

1 adequate fish habitat. The Washington Department of Fish and Wildlife has identified 326  
2 streams with low flow problems. Ecology considers numerous streams and watersheds  
3 throughout Washington to be overappropriated and unable to withstand additional depletions.

4 14. Depleted streamflows are a major factor causing the decline of salmonid fish  
5 stocks throughout Washington. In 1992, the Department of Fish and Wildlife found that 42% of  
6 the fish stocks in Washington whose status could be determined were either depressed or critical.  
7 A depressed fish stock is one whose production is below natural rates. A critical fish stock is  
8 one whose production level is so low that permanent damage to the stock is likely or has already  
9 occurred. Federal agencies have listed bull trout and certain chinook and steelhead populations  
10 ~~within Washington as threatened or endangered under the federal Endangered Species Act and~~  
11 have proposed several additional stocks of chinook and steelhead for listing. The Department of  
12 Fish and Wildlife anticipates that Washington populations of coastal coho, chum, sockeye, and  
13 cutthroat trout may also be listed under the Endangered Species Act within the next two years.

14 15. To effectuate effective management and regulation of public waters, the  
15 Washington legislature passed RCW 90.03.360, which requires that "[t]he owner or owners of  
16 any water diversion shall maintain, to the satisfaction of the department of ecology, substantial  
17 controlling works and a measuring device constructed and maintained to permit accurate  
18 measurement and practical regulation of the flow of water diverted." RCW 90.03.360(1). To  
19 implement this mandate, the statute directs Ecology to require metering under certain conditions.  
20 Subsection (1) of RCW 90.03.360 provides: "Metering of diversions or measurements by other  
21 approved methods shall be required as a condition for all new surface water right permits, and  
22 except as provided in subsection (2) of this section, may be required as a condition for all  
23 previously existing water rights." (Emphasis added). Subsection (2) of RCW 90.03.360

1 provides: "Where water diversions are from waters in which the salmonid stock status is  
2 depressed or critical, as determined by the department of fish and wildlife, or where the volume  
3 of water being diverted exceeds one cubic foot per second, the department shall require metering  
4 or measurement by other approved methods as a condition for all new and previously existing  
5 water rights or claims" (emphasis added).

6 16. The language of RCW 90.03.360 is clear and unambiguous. Subsection (1)  
7 makes metering mandatory for all new permits. Metering for existing rights is discretionary  
8 unless the diversion falls within the categories described in subsection (2). Subsection (2)  
9 requires metering for all existing rights and claims where diversions are from waters containing  
10 depressed or critical salmonid stocks or exceed one cubic foot per second ("cfs"). The statute  
11 further provides that the requirement of metering for rights specified in subsection (2) must be  
12 prioritized over Ecology's existing compliance workload "where a delay may cause a decline of  
13 wild salmonids." RCW 90.03.360(2). In addition, the statute authorizes Ecology to require the  
14 owner of a water right or claim to file reports documenting the amounts being diverted. RCW  
15 90.03.360.

16 17. The metering requirements of RCW 90.03.360 apply equally to surface and  
17 groundwater appropriations. Although RCW 90.03 by its terms applies only to surface water,  
18 the statutory provisions regulating groundwater, found in RCW 90.44, incorporate and apply the  
19 provisions of the surface code to the groundwater code. RCW 90.44.020 provides: "This  
20 chapter regulating and controlling groundwaters of the state of Washington shall be supplemental  
21 to chapter 90.03 RCW, which regulates the surface waters of the state, and is enacted for the  
22 purpose of extending the application of such surface water statutes to the appropriation and  
23 beneficial use of ground waters within the state."



18. Ecology's rules implementing the metering statute recognize this incorporation by reference and apply the metering requirements of RCW 90.03.360 to both surface and groundwater appropriations. See WAC 508-64-010 (Ecology vested with the power to require metering of "those diverting and/or withdrawing waters of the state, both surface and ground") (citing RCW 90.03.360 and RCW 90.44.020). The rules further acknowledge that conflicts arising from increased competition for limited water resources make it "necessary to . . . insure that those entitled to make beneficial use of water neither waste water in exercising their rights nor use waters by withdrawal or diversion thereof in amounts in excess to which they are entitled. . . . It has become increasingly apparent that a satisfactory water management program can be carried out only if surface and ground water withdrawals are closely monitored and accurately measured." WAC 508-64-010 (emphasis added).

19. Ecology adopted WAC 508-64 to establish "[t]he procedures the department of ecology will follow in determining when installation of a meter shall be required." WAC 508-64-010. However, WAC 508-64-050 does not require or permit metering in the circumstances prescribed in RCW 90.03.360. The metering rule provides that Ecology may only require metering of new or existing rights when one of the following conditions is met: (1) there is a need to implement metering to determine whether the diversion is exceeding the limits of the established right; (2) Ecology is conducting studies of stream and aquifer systems for management purposes, and metering is necessary to conduct the studies properly; (3) Ecology has grounds to believe mining of groundwater is occurring, and metering is necessary to ensure sufficient pumping lift or reductions in artesian pressure; or (4) metering is necessary to resolve a conflict between established rights over the rate or volume of diversions. WAC 508-64-050(1)-(4). The metering rule does not require or permit metering as a condition for all new permits, nor

1 does it require or permit metering on all existing rights which divert from waters containing  
2 depressed or critical fish stocks or which divert in excess of one cfs.

3 20. Ecology has compounded the inadequacies in its implementing regulations  
4 through its implementation of the metering program. Ecology does not require metering of all  
5 new surface water permits. Ecology does not require metering of all existing surface water rights  
6 and claims that deplete waters containing depressed or critical fish stocks, nor does Ecology  
7 require metering of existing diversions which exceed one cfs. Ecology has failed to prioritize  
8 implementation of the metering requirement for existing rights ahead of existing compliance  
9 workload in situations where delay may cause the decline of wild salmonids. Finally, Ecology  
10 has failed to apply RCW 90.03.360 to new and existing groundwater withdrawals.

#### 11 FIRST CAUSE OF ACTION

12 21. The Washington Administrative Procedure Act ("APA"), RCW 34.05.570(2)(c),  
13 authorizes this Court to declare invalid any rule that is arbitrary and capricious or exceeds the  
14 statutory authority of the agency.

15 22. The metering statute directs Ecology to require metering as a condition for all  
16 new water right permits. RCW 90.03.360(1). Ecology's rule fails to implement this statutory  
17 requirement. The rule does not require or permit Ecology to impose metering as a condition for  
18 all new permits. WAC 508-64-050.

19 23. The metering statute also directs Ecology to require metering for existing rights  
20 and claims where the diversion is from waters containing depressed or critical fish stocks, as  
21 determined by the Department of Fish and Wildlife, or where the volume of water diverted  
22 exceeds one cfs. RCW 90.03.360(2). Ecology's implementing rule does not require or permit  
23

1 Ecology to impose metering for all existing rights and claims under such circumstances. WAC  
2 508-64-050.

3 24. Ecology has violated the APA, RCW 34.04.570(2)(c), because the challenged  
4 rule, WAC 508-64-050, is contrary to the metering statute, arbitrary and capricious, and in  
5 excess of Ecology's statutory authority.

6 SECOND CAUSE OF ACTION

7 25. The APA, RCW 34.05.570(4), authorizes this Court to compel an agency to  
8 perform a duty that is required by law if the failure to perform the duty is arbitrary and capricious  
9 or outside the agency's statutory authority.

10 26. By failing to require metering as a condition of new and existing water rights and  
11 claims as directed in RCW 90.03.360, Ecology has failed to perform a duty required by law.  
12 Because the language of RCW 90.03.360 is mandatory and unambiguous, Ecology's failure to  
13 implement the statute is arbitrary and capricious, beyond Ecology's statutory authority, and  
14 violates the APA, RCW 34.05.570(4)(c).

15 THIRD CAUSE OF ACTION

16 27. The metering statute requires Ecology to give special priority to implementing the  
17 provisions of RCW 90.03.360(2) governing metering of water rights that affect depressed or  
18 critical fish stocks or divert in excess of one cfs. RCW 90.03.360(2) provides that Ecology  
19 "shall prioritize the requirements of this subsection ahead of the existing compliance workload  
20 where a delay may cause the decline of wild salmonids."

21 28. Because Ecology has failed to prioritize implementation of RCW 90.03.360(2)  
22 ahead of its existing compliance workload where delay threatens harm to wild salmonids,  
23 Ecology has failed to perform a duty required by law. Ecology's failure to give priority to its

1 duty under RCW 90.03.360(2) is arbitrary and capricious, beyond Ecology's statutory authority,  
2 and violates RCW 34.05.570(4)(c).

3 **FOURTH CAUSE OF ACTION**

4 29. Under RCW 90.44.020, the provisions of the surface water code found in RCW  
5 90.03 apply with full force to groundwater withdrawals. However, Ecology has failed to apply  
6 RCW 90.03.360 fully to groundwater withdrawals. Ecology does not require metering of all new  
7 withdrawals and existing withdrawals which deplete waters containing depressed or critical fish  
8 stocks or are in excess of one cfs. Ecology's failure to apply RCW 90.03.360 fully to  
9 groundwater withdrawals is arbitrary and capricious, beyond the agency's statutory authority,  
10 and violates RCW 34.05.570.

11 **PRAYER FOR RELIEF**

12 WHEREFORE, petitioners request that the Court grant the following relief:

13 A. DECLARE that WAC 508-64-050 is invalid, arbitrary and capricious, and beyond  
14 Ecology's statutory authority;

15 B. ORDER Ecology to promulgate a rule that is consistent with the mandates of RCW  
16 90.03.360;

17 C. DECLARE that RCW 90.03.360 applies to new and existing groundwater  
18 withdrawals;

19 D. ENJOIN Ecology from issuing any new surface or groundwater permits unless  
20 metering or measurement by other approved methods is made a condition of such  
21 permits;

22 E. ORDER Ecology to require metering or measurement by other approved methods as a  
23 condition for: (1) all new surface and groundwater permits and rights; and (2) all

1 existing surface and groundwater rights and claims which either divert from waters in  
2 which salmonid stock status is depressed or critical, as determined by the Department  
3 of Fish and Wildlife, or which divert in excess of one cfs;

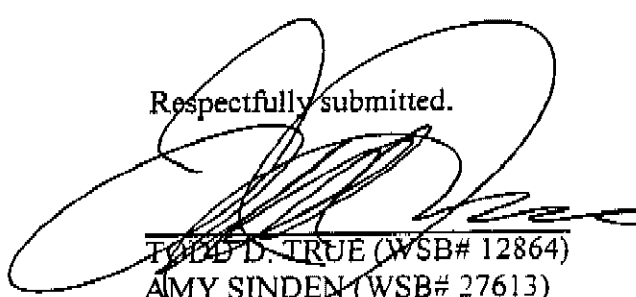
4 F. ORDER Ecology to prioritize the requirements of RCW 90.03.360(2) ahead of its  
5 existing compliance workload where delay may cause the decline of wild salmonids;

6 G. AWARD petitioners their costs and attorney's fees pursuant to RCW 4.84.350-360;  
7 and

8 H. AWARD such other and further relief as the Court deems just and equitable.

9 DATED this 17<sup>th</sup> day of March, 1999.

10  
11 Respectfully submitted.

12  
13   
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CERTIFICATE OF SERVICE

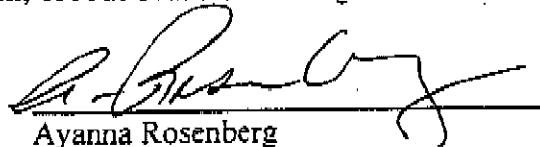
I am a citizen of the United States and a resident of the State of Washington. I am over 18 years of age and not a party to this action. My business address is 705 Second Avenue, Suite 203, Seattle, Washington 98104.

On March 17, 1999, I served a true and correct copy of PETITION FOR JUDICIAL REVIEW AND DECLARATORY AND INJUNCTIVE RELIEF via messenger on the person listed below:

Washington State Department of Ecology  
300 Desmond Drive  
Lacey, Washington 98503.

I, Ayanna Rosenberg, declare under penalty of perjury that the foregoing is true and correct.

Executed on this 17th day of March, 1999 at Seattle, Washington.

  
Ayanna Rosenberg